

STATE OF CALIFORNIA
Energy Resources Conservation
And Development Commission

In the Matter of:)	
Application for Certification for the)	Docket No. 07-AFC-5
Ivanpah Solar Electric)	
Generating System)	
_____)	

**ENERGY COMMISSION STAFF BRIEF ON
PETITION FOR RECONSIDERATION**

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I. INTRODUCTION

The Energy Commission's September 22, 2010, Final Decision is the subject of a Petition for Reconsideration (Petition) from Intervenor Basin and Range Watch (BRW) filed October 4, 2010. Petitions for Reconsideration are required to set forth either (1) new evidence that could not have been diligently produced at the evidentiary proceedings, or (2) an "error in fact" or an "error in law" in the Final Decision. (Cal. Code Regs., tit. 20, § 1720(a).)

BRW purports to meet both of the above prongs of Section 1720. Citing a passage on p. 41 of the Final Decision, BRW contends that the Final Decision errs in stating that the genetic differentiation of desert tortoise in the Northeastern Mojave Recovery Unit (NMRU) is a "speculative" concern. (Petition, p. 1.) Secondly, BRW points to new information from the U.S. Fish and Wildlife Service's (USFWS) Biological Opinion (BO) for the NextLight Silver State Solar Project, a Nevada project also in the NMRU, describing desert tortoise survey results from small study plots as well as from the proposed translocation plan. BRW asserts that this is new information that should have been included in staff's impact analysis and mitigation recommendations, and that the Biological Opinion and translocation plan for the Ivanpah project should have been completed prior to the Final Decision (Petition, pp. 3-9). Finally, BRW contends that the Final Decision errs in stating that the mitigation requirements of the Final Decision,

including that for habitat compensation, will result in “no net loss in the tortoise population due to this project.” (Petition, pp. 9-10.)

II. SOME LANGUAGE IN THE FINAL DECISION IS ILL-PHRASED, BUT SUCH DOES NOT REQUIRE RECONSIDERATION.

The parties all testified in agreement that the desert tortoise population in the NMRU is part of a genetically distinct population (variously termed as an “evolutionary significant unit” or “distinct population segment”). (See, e.g., 1/11/10 RT pp. 158, 196-197 [Applicant], 284, 333-336 [Staff], 428-431 [intervenors].) No evidence to the contrary was submitted.

Accordingly, Staff agrees with BRW’s statement (Petition, p. 3) that there is ample evidence in the record confirming the genetic distinctiveness of the desert tortoise subpopulation within the NMRU. The Final Staff Assessment (FSA) confirmed that the desert tortoise at the project site were part of a population that is genetically distinct within the NMRU; other parties filed testimony agreeing and further elaborating on the matter. However, Staff believe that BRW misinterprets the meaning of the “speculative” comment they cite from Page 33 of the PMPD Errata (Final Decision, p. 41). A review of the August 24, 2010, Hearing Transcript (pp. 150-153) cited by the Final Decision indicates that the “speculative” comment does not pertain to genetic differences of desert tortoise populations in different recovery units, but rather between tortoises within the same recovery unit, specifically those occupying the project site and those found a few miles south of the project site in the Mojave National Preserve. The topic was discussed at the August 24th hearing when the Mojave National Preserve was a potential translocation site, but this issue is no longer relevant now that this site is not being considered for translocation.

Significantly, there is no question that the FSA and the discussions at hearings met the CEQA objectives of informing the public and decision makers with respect to the impacts of the project on the desert tortoise within the NMRU. The Final Staff

Assessment (p. 6.2-71), Staff's Opening and Reply Briefs, and hearing testimony (1/11/10 RT 284) concluded that the Ivanpah Project, combined with future proposed projects, would significantly affect a genetically distinct subpopulation of desert tortoise within the NMRU that occurs in the Ivanpah Valley, and that Staff's recommended mitigation measures (including Condition of Certification BIO-17) would fully mitigate such impacts.

The recently released USFWS Biological Opinion for the Ivanpah project similarly concluded that the Ivanpah Project will cause habitat fragmentation and habitat loss, but that those effects would not appreciably affect the recovery of desert tortoise populations. Based on a detailed analysis of the impacts of the Ivanpah project and other foreseeable projects to desert tortoise in the NMRU, the USFWS concluded as follows (Ivanpah BO, p. 54):

"The distribution of the desert tortoise would be reduced by approximately 5 square miles, based on the amount of long-term and permanent disturbance associated with the proposed action. As we mentioned previously in the biological opinion, this loss comprises approximately 0.07 percent of the modeled habitat in the Northeastern Mojave Recovery Unit and approximately 0.15 percent of the modeled habitat if we use the conservative estimate discussed previously in this section. Although this loss of habitat is likely to increase fragmentation of habitat and decrease the overall sustainability of the recovery unit that is isolated by Interstate 15, Ivanpah Lake, Primm, Nevada and the Clark Mountains, it will not appreciably reduce the amount of habitat available to the desert tortoise when considered in the context of the entire Northeastern Mojave Recovery Unit.

Although the effects of this project are substantial, we do not anticipate that it will result in effects that appreciably reduce the current distribution, numbers, or reproduction of the overall population within the Northeastern Mojave Recovery Unit or range wide. We anticipate that the compensation programs (i.e., the one proposed by the Bureau and the other approved by the California Energy Commission) will result in an increase in the amount of habitat that is managed for the conservation of this species and will result in many advances in the implementation of recovery actions. We anticipate that this compensation will offset many adverse effects associated with this project. Taking into consideration this compensation

that is proposed, the lack of statistical trends in population size in this recovery unit, and considering the relative scale of the adverse effects in the context with our current estimates of the species' status in the Northeastern Mojave Recovery Unit and range wide, we do not anticipate that construction of this project would appreciably reduce our ability to recover the desert tortoise."

The BO for Ivanpah elaborates further on genetic variation, and sets forth a comprehensive plan to benefit the NMRU tortoise consistent with the compensation measures described in the Final Decision. The Final Decision requires Applicant to fund many of the BO recommended elements, and benefits NMRU tortoise through habitat enhancement and land purchases. These mitigation measures described by Staff in the Final Decision (pp. 69-81), in Staff Rebuttal Testimony (pp. 18-19), and in the USFWS BO (pp. 19-21), include recovery actions developed cooperatively by the California Department of Fish and Game, USFWS, BLM, and Staff, and are consistent with recommendations in the Desert Tortoise Recovery Plans (USFWS 1994, 2008).

The Final Staff Assessment (pp. 6.2-2, 6.2-51) explains how these habitat enhancements and land purchases improve the carrying capacity of the land by restoring habitat, fencing, and road closures. As a result, more desert tortoise will survive and reproduce, offsetting over time the decrease in numbers of tortoise resulting from habitat loss and other project impacts. There was significant agreement between the parties that such mitigation funding would help implement the recovery actions described in the USFWS Desert Tortoise Recovery Plan (which has lacked sufficient funds to implement measures such as fencing, raven control, habitat restoration, and road closures) and benefit tortoise within the NRMU and the Ivanpah Valley. (See, e.g., 1/11/10 RT pp. 140, 159-162 [Applicant], 438-439, 460-462, 465-468 [intervenors], 352, 380 [Dept. of Fish and Game].)

The term "no net loss" that BRW cites on page 9 of their Petition (from p. 30 of the PMPD errata, p. 32 from the Final Decision) is no more than a descriptive reference regarding how habitat improvement mitigation and land purchases will, in combination, benefit desert tortoise and eventually offset project impacts. Tortoise experts for

intervenors testified as to the benefits of enhancement actions like fencing , habitat restoration, and land acquisition for desert tortoise (1/11/10 RT pp 438-439, 460-462, 465-468), as did the California Department of Fish and Game (pp. 352, 380). Applicant's experts testified in agreement. (1/11/10 RT pp. 159, 161-162.) Intervenor experts also testified as to the long-term importance of purchasing and preserving offset habitat. (1/11/10 RT pp. 465-466.) The "no net loss" term is a term of art used in different contexts and therefore best avoided, but the fundamental point is that the Commission believes that, with the Final Decision's extensive requirements, impacts to the tortoise will be fully mitigated.

Thus, although Staff believes that the language in the Final Decision called out by BRW could have been clearer or better phrased, there is no need or value in reconsidering the underlying issues. The genetic uniqueness of the NRMU tortoise was never at issue, and all parties who testified on the matter agreed that proposed mitigation would benefit tortoise both within and beyond the NRMU.

III. THE NEXTLIGHT SILVER STATE SOLAR PROJECT BO IS NEW INFORMATION NOT AVAILABLE AT THE TIME OF THE EVIDENTIARY HEARING, BUT SUCH DOES NOT REQUIRE RECONSIDERATION.

Staff included the NextLight Silver State project in the list of projects considered in the cumulative impact analysis (FSA, pp. 5-13, Cumulative Scenario Table 3 Future Foreseeable Projects in the Ivanpah Valley Area; pp. 6.2-70, Biological Resources Table 6 Future Foreseeable Projects in the Ivanpah Valley). While Staff's analysis did not include survey data detailing the numbers of desert tortoise potentially affected by the NextLight Silver State project, that is true for virtually all of the foreseeable projects listed in this or any other cumulative impact analysis. Those specifics would not alter Staff's or USFWS' conclusions about desert tortoise impacts and mitigation for the Ivanpah project.

BRW asserts that there is new information about the conservation status of the Northeastern Mojave Recovery Unit that is not in the record, and cites voluminously

from the NextLight Silver State project BO, but nowhere indicates what information they considered sufficiently new and different from that already in the record that would warrant reconsideration and changes from the conclusions and mitigation requirements contained in the Decision. As stated above, these issues were fully considered in the Ivanpah proceeding. New information that is cumulative or corroborative of the prior testimony does not merit granting reconsideration.

October 25, 2010

/s/ Richard Ratliff

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